

STATE OF MICHIGAN
COURT OF APPEALS

MARILYN MOSCHKE,

Plaintiff-Appellant,

v

MEMORIAL MEDICAL CENTER OF WEST
MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
February 21, 2003

No. 238264
Mason Circuit Court
LC No. 00-000549-CL

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was employed by defendant from 1970 to 2000 as a nurse, serving as a surgical technologist in defendant's operating room. The job of surgical nurse involved standing, at times for long periods, and some heavy lifting. In addition, defendant required that surgical nurses take periodic "on-call" duty, which involved being available to return to the hospital to respond to emergencies. In 1994, plaintiff began experiencing back pain that impaired her ability to lift or to stand for prolonged periods of time. She sought accommodation based on her back condition. Plaintiff remained classified as a surgical nurse; however, she was not required to engage in heavy lifting or to take on-call duty. Plaintiff was assigned to work in the Scope Room, and was able to sit while performing many of her duties.

In May 2000, defendant received complaints from other staff members that they were overburdened by having to take on-call duty so often. Plaintiff and several other surgical technologists at that time were not doing on-duty call. Defendant informed plaintiff and the others that they would be required to perform or resume performing all of the duties of a surgical nurse, including taking on-call duty. Defendant gave plaintiff the option of transferring to another position in the hospital. Plaintiff declined both options, and defendant terminated her employment in September 2000. All surgical technologists on staff were performing on-call duty by March 2001.

Plaintiff filed suit alleging that defendant refused to accommodate her and discharged her in violation of the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*,

and that defendant violated the Bullard-Plawecki Employee Right to Know Act, MCL 423.501 *et seq.*, by refusing her the opportunity to review her personnel record.¹ Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff was not disabled within the meaning of the PWDCRA because her physical condition was directly related to her ability to perform the duties of a surgical nurse. Defendant asserted that the ability to take on-call duty was an essential function of the job of surgical nurse. Defendant also argued that plaintiff was not disabled within the meaning of the PWDCRA because her condition did not substantially limit a major life activity, and that she was not entitled to the accommodation she demanded, i.e., the creation of a position that did not require taking on-call duty, because the PWDCRA did not require an employer to create a new position to accommodate an employee.

The circuit court granted defendant's motion for summary disposition, finding that the ability to take on-call duty was an essential function of the job of surgical nurse.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

The PWDCRA precludes employers from discharging an employee for a disability unrelated to that employee's ability to perform a particular job or position. MCL 37.1202(1)(b). To establish a prima facie claim under the PWDCRA, a plaintiff must show that: (1) she is disabled within the meaning of the Act; (2) the disability is unrelated to her ability to perform the duties of a particular job; and (3) she has been discriminated against in a way prohibited by the Act. *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). The PWDCRA defines a disability as a determinable physical or mental characteristic that substantially limits one or more major life activities and is unrelated to the ability to perform the duties of a particular job. MCL 37.1103(d). A major life activity is a basic activity such as breathing that an average person can perform with little or no difficulty. Whether such an activity is substantially limited by an individual's impairment is determined by considering: (1) the nature and severity of the impairment; (2) the duration or the expected duration of the impairment; and (3) the permanent or expected permanent or long-term effect of the impairment. *Lown v JJ Eaton Place*, 235 Mich App 721, 728-729; 598 NW2d 633 (1999).

The undisputed evidence established that plaintiff's back problems precluded her from engaging in heavy lifting or from standing for long periods of time, and prevented her from taking on-call duty in the operating room. The circuit court did not specifically find that plaintiff was disabled as that term is defined by the PWDCRA. MCL 37.1103(d). However, the court did not err in concluding that reasonable minds could not differ on whether the ability to take on-call duty was an essential function of the job of surgical nurse, and that because plaintiff could not perform this function with or without accommodation, she was not entitled to the protection of the PWDCRA. MCL 37.1202(1)(b). Defendant's job description characterized participating

¹ Plaintiff does not challenge on appeal the circuit court's dismissal of her claim under the Employee Right to Know Act.

in on-call duty as a primary function of the position of surgical nurse, and defendant's administrators described taking on-call duty as an essential function of the job.²

The circuit court did not err in concluding that reasonable minds could not disagree that the ability to take on-call duty was an essential function of the job of surgical nurse. The court did not err in deciding the issue as one of law and concluding that plaintiff's condition precluded her from performing an essential function of the job of surgical nurse. Defendant was not required to restructure plaintiff's job, i.e., assign her to work only in the Scope Room and relieve her of other duties of a surgical nurse, including taking on-call duty, in order to accommodate her condition. See *Kerns v Dura Mechanical Components, Inc (On Remand)*, 242 Mich App 1, 16; 618 NW2d 56 (2000). Summary disposition was appropriately granted.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Helene N. White

/s/ Joel P. Hoekstra

² Plaintiff's reliance on *Kiphart v Saturn Corp*, 251 F3d 573 (CA 6, 2001), as support for her contention that if a policy pertaining to one aspect of a job is enforced inconsistently or not at all a question of fact exists as to whether that particular aspect is an essential function of the position, is misplaced. In that case the plaintiff, who suffered from tendonitis, was placed on involuntary medical leave due to his inability to perform all of the jobs assigned to his team. The plaintiff alleged disability discrimination under the Americans With Disabilities Act, 42 USC 12101 *et seq.* A jury found in favor of the plaintiff; however, the district court ordered the clerk not to enter the verdict, and found as a matter of law that the ability to rotate through all jobs assigned to the team was an essential function of the plaintiff's job.

The *Kiphart* Court disagreed and ordered the verdict entered, finding that a question of fact existed as to whether the ability to perform every job assigned to the team was an essential function of the plaintiff's job. The *Kiphart* Court noted that not all job postings stated that the ability to rotate was a necessary qualification, and that the defendant never fully implemented the rotation system. *Id.*, 585-586. In *Kiphart, supra*, the plant could function even if task rotation did not occur. In this case, defendant's operating rooms could not function if surgical nurses were not available at all times. In any event, *Kiphart* is not binding on this Court.